No. 11091

United States
Circuit Court of Appeals
For the Ninth Circuit

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

On Appeal from the United States District Court for the District of Idaho, Southern Division

HONORABLE CHARLES C. CAVANAH, *Judge*

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JURISDICTION

This is an action instituted by the United States, appellee, against P. G. Batt, a resident of Idaho, under Section 3744 Internal Revenue Code (Sec. 3744, Title 26, U. S. C.) for the recovery of excise taxes for the year 1938 alleged to be payable and due for unemployment compensation under Title IX of the Social Security Act (Secs. 1100 et seq. Title 42; Secs. 1600 et seq., Title 26; U. S. C.) (Record pp. 2-3).

Jurisdiction of the District Court is founded upon Secs. 41 (1) (5), 105, 112, Title 28; Sec. 3744, Title 26, U. S. C.

Jurisdiction of this court is sustained under Sec. 225, Title 28, U. S. C.

Judgment in favor of the United States was entered April 6, 1945; notice of appeal was filed June 20, 1945 (Record, p. 34); record certified July 2, 1945, and filed in this court July 5, 1945 (Record, p. 36); Statement and Designation was filed July 13, 1945 (Record, p. 39).

STATEMENT OF THE CASE

In 1938, the Federal Social Security Act, Title IX (Sec. 901, 49 Stat. 639; Sec. 1101, Title 42 U. S. C.) imposed upon employers an excise tax of 3% of total wages payable by him with respect to employment. Against this the employer was allowed a credit, not exceeding 90% of the Federal tax, for amounts (contributions) paid by him with respect to employment into an Unemployment fund under a state law (Sec. 902, idem; Sec. 1102, idem). The State fund was deposited with the United States Treasurer and by the latter repaid upon requisitions of the State (Secs. 903, 904 idem; Secs. 1103, 1104 idem).

The United States made, and makes, no payment of benefits to unemployed employees.

The State alone makes payments of benefits to unemployed, by virtue of a law therefore passed by the State, if approved by the Federal Social Security board. (Sec. 903 idem; Sec. 1103 idem).

Since in 1938 the Federal tax was payable only "with respect to employment (as defined in Section 907 of this chapter)" and said section 907 defined "employment" as

> "any service, of whatever nature, performed within the United States by an employee for his employer, *except* (1) *Agricultural labor;* * *"

there was not imposed any Federal tax upon wages paid by an employer to employees performing agricultural labor. The act contained no definition of agricultural labor. The act gave the Commissioner of Internal Revenue power to make rules and regulations "for the enforcement" of the Act, but none for the interpretation, or to make definitions or determinations of what was or was not agricultural labor (Sec. 908 idem; Sec. 1108 idem). So also the Secretary of the Treasury, Secretary of Labor and Social Security Board (Sec. 1102 idem; Sec. 1302 idem).

The State of Idaho, under the urgent necessity imposed by the Federal law, and in order to secure benefits thereunder for its workmen, who otherwise would secure nothing and whose employers would be otherwise federally taxed without any return of benefits to such workmen, adopted an Unemployment Compensation Law (Sec. 2 (b) Chap. 12, 3d Extra Session of 23d Session, 1936, Idaho Legislature) providing for payment of unemployment benefits to workmen and for an excise tax upon employers (in 1938) of 2.7% of

> "wages payable by him with respect of employment as defined in this act" (Sec. 7, Chap. 183, 1937 Idaho Session Laws, p. 304)

and "employment" was defined as meaning

> "(g) * * service * performed for wages * * (6) The term 'employment' shall not include— * * (D) Agricultural labor * *" (Sec. 19 (g) (6), Chap. 187, 1937 Idaho Session Laws, pp. 316-318).

The appellant, Batt, for the year 1938 paid the State tax of $613.04 under protest to the State on account of wages in the amount of $22,705.08 paid his workmen for services of the character hereinafter set forth and which he claimed to be agricultural labor; the Federal tax thereon was $681.15; the amount paid the State was credited, leaving due the Federal government $68.11 which appellant paid January 26, 1939. In 1941, pursuant to the State law, appellant applied for a refund of the State tax, and after proceedings therein resulting in the opinion and order of the Supreme Court of Idaho reported as Batt v. Unemployment Comp. Div. in 63 Idaho 572, 123 Pac. (2) 1004, whereby such court held the services to have been agricultural labor and not subject to tax, refund of the State tax to the extent of $571.33 was made (Record, pp. 6-7, 15-16).

Thereafter this suit was commenced by the United States to recover its alleged entire tax of $681.15, less $68.11 originally paid, and without State tax credit, except for $41.71 not refunded by the State (Record, pp. 2-3). The appellant denied liability to tax inasmuch as the services for which

wages were paid were agricultural labor (Record, pp. 3-5).

The sole basic question is whether or not the services were agricultural labor within the term used by the Federal statute. They have been found to be agricultural labor within the same term used in the inter-dependent and cooperating State statute, involving the identical employer and services.

There is no dispute of fact. The facts are stipulated (Record, pp. 5-16).

Appellant Batt was an Idaho farmer, in 1938 operating about 900 acres of farm lands upon which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops) (Record, pp. 6, 7).

During a short season of the year (varying according to produce from one to two months in late summer—Record, p. 11) Batt operated two "processing" sheds on trackage off his farms for the "processing" of his own farm produce, employing the labor and services and paying the wages therein which are alone the subject of the alleged tax sought to be recovered by the United States herein (Record, p. 7).

Other farmer producers of similar produce employed Batt, such laborers and facilities, to "process" their produce and paid for this service (Record, p. 7). In 1938, 25% of the produce "processed" was raised and owned by Batt, and 75% raised and owned by other farmers who employed Batt and such labor. All produce, marketable and unmarketable and culls, continued to belong to the original producer thereof throughout "processing" and after

"processing" was completely finished and until the producer himself sold it; the marketable portions, ascertained by "processing", were thereafter sold by the producer thereof, sometimes (in case of potatoes) to Batt, as a buyer, sometimes (in the case of potatoes and always in case of lettuce, peas and carrots) to others on consignment, Batt acting as selling or consigning agent of the producer; culls or other unmarketable produce were owned by and went back to the farmer producer, or were disposed of as he directed and did not go into market (Record, pp. 7, 10).

"Processing" is a cleaning, sorting, grading and packing operation in no way changing the raw produce (Record, pp. 12-13) and is a statutory, regulatory and practical essential incident to production and disposition by the producer of the produce herein involved, i.e., potatoes, onions, lettuce, carrots and peas (Record, p. 8). Many farmers, particularly the ones engaged in large operations, process as ordinary farm operations their own production on or off their premises, by their own employees or by professional travelling crews engaged in that business, using equipment owned by the crew, and in neither case did the United States require payment of the tax (Record, pp. 9, 13-14). But the United States does seek to impose the tax upon Batt herein, both in connection with processing his own production (25%) and in connection with processing the production of others.

No specialized equipment, or equipment not generally available to farmers, is required (Record, p. 9) and labor is unskilled, and largely transient and temporary (Record, p. 12).

Processing, in the case of potatoes, consists of taking out dirt, vines, culls, washing and pre-cooling, sorting, grading, and placing the part found marketable in bags, loading and icing (Record, p. 13); in the case of onions the same, except washing (Record, p. 14); in the case of lettuce, cutting off the butt, clipping surplus wrapper, broken and discolored leaves, discarding unsuitable heads, sizing marketable heads, crating, icing and loading (Record p. 14-15); in the case of peas, discarding unmarketable portions, packing, pre-cooling, loading and icing (Record p. 15); in the case of carrots, washing, sizing, packing, loading and icing bunches (Record, p. 15).

The trial court's initial opinion (Record pp. 17-29) after repeating the stipulation of facts, shows that the Court (Record, pp. 25-29) excluded the services from agricultural labor, and made them subject to tax, wholly on the basis of this Court's decisions in the North Whittier Heights Citrus Association case (109 Fed (2) 76) and the Idaho Potato Growers case (144 Fed (2) 295) both of which were interpretations of the National Labor Relations Act, and not at all interpreting the Social Security Act, the purposes and phraseology of which are distinctly different, and which, as the first named Act does not, requires for the accomplish-

ment of its purposes in any State an interpretation corresponding to the interpretation given identical words used in the essential auxiliary State statute. The trial court's second opinion (Record pp. 29-32) shows the same (Record p. 31) and that the court ignored the type of labor as a factor, and gave consideration only to its alleged commercial or industrial aspect (Record, pp. 29, 31); it likewise brushed aside the fact that identical labor is agricultural in Idaho within the meaning of the auxiliary Idaho State statute (Record, p. 28); it likewise ignored the fact stipulated that 25% of the produce processed was Batt's own farm production, not taxable nor taxed in cases of other farmers and so stipulated (Record, p. 9); and accordingly found (Finding III, Record, p. 32) solely because the services "were of a commercial character and in the field of industrial activity," and adjudged that all such services (including that upon Batt's own produce) were taxable and the whole tax recoverable (Record, pp. 33, 34).

SPECIFICATIONS OF ERROR

The trial court erred:

1

In finding (Finding III, Record, p. 32) contrary to the facts and law that the services were not agricultural labor, but were of a commercial character and in the field of industrial activity.

II

In finding (Finding III, Record, p. 33) contrary to the facts and law that the services were covered by provisions of Title 9 of the Social Security Act (49 Stat. 639; 42 U. S. C. 1101 et seq.).

III

In finding (Finding IV, Record, p. 33) contrary to the facts and law that $22,705.08 of wages paid were subject to the tax.

IV

In finding (Finding V, Record, p. 33) contrary to the facts and law that a balance of $571.33 is unpaid and owing to the United States as of January 26, 1939.

V

In concluding (Conclusions I, Record, p. 33) contrary to the facts and law, that the United States was entitled to judgment against appellant in the sum of $571.33 together with interest and costs.

VI

In failing to find, conclude and adjudge that the service rendered upon Batt's produce was agricultural labor.

VII

In failing to find, conclude and adjudge in accord with the facts and law that all services were agricultural labor, excepted from tax; that no tax was

payable or due; that judgment be entered for defendant.

ARGUMENT

The United States seeks the recovery of the tax and necessarily asserts that the services were taxable, that is, that they were not "agricultural labor." If they, or any distinguishable part, were agricultural labor, either no tax at all, or at least none with respect to the distinguishable part, was payable or collectible because the Social Security Act specifically excepted such labor (without definition) from tax by excepting it from the definition of employment, i.e.

> "any service, of whatever nature * * by an employee for his employer, except (1) Agricultural labor * *"
>
> Sec. 907, 49 Stat. 639, 42 USC 1107.

The one question then is the "type of work" that was being done; the answer is to no extent dependent upon the manner or means of employment. As this Court held in a Social Security Act case involving agricultural labor:

> " 'The exception attaches to the services performed by the employees and not to the employee as an individual * *'
>
> Accordingly, the exemption attaches to the 'service performed', which refers to the type of work that is being done, and is not dependent on the form of the contract or whether the

employee is employed by the owner or tenant of the farm or an independent contractor."

Stuart v. Kleck, 129 F (2) 400, 402 (9th CCA).

Lowe v. No. Dak. Comp. Bureau, 66 N. D. 246, 264 N. W. 837, 107 A. L. R. 973.

"* * services rendered by a company in cultivating crops of citrus fruit under contracts with crop owners were 'agricultural labor' rendered in connection with the cultivation of the soil, even though crop owners did not directly hire laborers but dealt with the company, which in turn put laborers to work, and the company was entitled to recover back social security taxes assessed with reference to wages paid to those laborers."

Stuart v. Kleck, 129 F (2) 400, 403 (9th CCA).

Fosgate Co. v. U. S. 125 F (2) 775.

Cal. Employ. Comm. v. Bowden, 126 P (2) 972 (Cal).

Wayland v. Kleck, 112 P (2) 207.

The Kleck case supra was identical with this in that there as here the United States was seeking to recover Social Security taxes from Kleck on account of wages paid by Kleck to laborers employed directly by him, Kleck in turn contracting with farmers for the doing of agricultural labor for such farmers by such laborers. In other words the farmers in the Kleck case, as here through Batt, through Kleck, the immediate or direct employer, employed

services of an agricultural type which Kleck and his crew or organization rendered directly to the farmer, the owner or tenant of the farm on which the farm produce in its raw or natural state was produced. In that case also, as here, the appellee (and here also the trial court) contended that the services were performed in a commercial or industrial, not agricultural, enterprise, and that the laborers were not in the employ of the owner or tenant of the land —considerations which this Court rejected in determining the type of work that was being done.

As said by the Idaho Supreme Court in passing upon the identical service, laborers, year and appellant under the State statute employing the identical language (Record, pp. 6-7) (the effect of which herein will be later discussed):

> "It is clear that the appellant (Batt) does for hire just such work as the farmer would have to do himself or hire someone else to do, on the farm or elsewhere in preparation of his products for market * *"
>
> Batt v. Unemployment Comp. Div., 63 Idaho 572, 123 P (2) 1004.
>
> And in Wayland v. Kleck, 112 P (2) 207:
>
> "What he was doing was not commercial, for he sold nothing. It was not manufacturing, for he made no article out of the raw materials taken from or grown upon the farm."

I

The United States has stipulated that the type of work is agricultural and that others than Batt,

rendering identical services are neither subject to nor have been required to pay contributions (taxes). Why a distinction is made in Batt's case is not readily apparent; presumably the only difference claimed is that Batt employs the laborers, who, through Batt, are employed by the farmer to perform the same essential agricultural services which the farmer requires when he directly employs the laborers or organized crews. In other words apparently the appellee claims the tax solely on account of

> "the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor"

a distinction which this Court (and others in cases above cited) has directly rejected in the Kleck case.

Certainly no distinction is claimed by the appellee on the theory that the services are performed off the farm, for the stipulation also is that identical services off the farm are not taxable. The stipulation is

> "* * many farmers did in fact process, pack and grade, and conduct the operations, hereinafter set forth on their own premises, in which event such farmers were not charged and did not pay contributions on account of the employees engaged therein; * * in respect to potatoes it was common practice for the farmers of large acreage to have potato cellars either on their own premises or elsewhere, and to employ crews of men who made it their busi-

> ness to go from farm to farm or cellar to cellar and use their own equipment, conduct the operations hereinafter stated, and receive their compensation from the farmer and upon which compensation no contribution was or need be paid; that in respect to peas the largest dealers in Idaho grew their own peas on owned or leased lands and processed their own produce, the processing taking place off such lands in warehouses or sheds available to tracks, performing the same operations as hereinafter stated in the case of the defendant and were not required to and did not pay any contribution with respect to the employees engaged in such operation" (Record, p. 11).

As to 25% of the tax, Batt is the farmer himself, employs the employees himself, and processes his own produce, raised on his own farm. He fits exactly the farmer described in the stipulation and the appellee's own interpretation of non-taxable wages. There can be no question that the Court erred in permitting recovery of 25% of the tax.

As to the balance of the tax, Batt and his crew fit exactly into the description of the professional crews described in the stipulation save only that they do not travel from place to place. We submit that that fact is not sufficient upon which to change "type of work" from agricultural to non-agricultural, from non-taxable to taxable. The Court erred in permitting recovery of any tax.

II

It is likewise stipulated that the type of work is agricultural labor. The stipulation is that "processing" (as in this case used) is an absolute necessity for every farmer who raises this kind of produce for market. It is as essential to the production of a consumable and marketable farm product as is cultivation, sowing, irrigating, harvesting. The State requires it; the Federal government requires it; the market place requires it; it is as incidental and necessary to farm operations as any of the prior steps in agriculture; and every farmer does it, either by himself, by his employees, by employing crews, by employing crews brought together by Batt and others; farmers large and small do it; the produce goes into the same market; the burden of tax, however, would be, if the judgment is affirmed, upon the produce of the small farmer, who must employ crews gathered and kept together as are Batt's, and not any upon the produce of the large farmer who can afford to gather and keep together his own directly employed crew; *yet even if the small farmer is taxed, or Batt is taxed, the controlling purpose of the tax and the Social Security Act is nonetheless defeated because in no event will the laborer employed realize any benefits therefrom.* More about this hereafter.

As said by the Supreme Court of Idaho in a second case involving similar taxes and appellant Batt's employees after the Idaho act had been amended

"* * had the packing and processing been done on their own farms and not in appellant's (Batt's) packing houses, such labor would be exempt. It would therefore follow that small farmers or tenants who are unable to build and equip a processing plant would be required to pay contributions, inasmuch as the owner of the processing plant would charge and collect from the small farmer whatever contributions he would be required to pay for processing, packing and making ready for market the farm products of the small farmer. We are not convinced the legislature in adopting the proviso contained in subsection (f), supra, intended to make possible such discrimination.

We think it was the legislative intent to exclude all services of wage earners in agriculture from the benefits of the act, and exclude from tax burden the produce of all farmers, large or small, whether processed on their own farms or at the processing plant of another, it all being agricultural labor. It clearly was not the intent of the legislature to burden the small farmer's produce with, and relieve the large farmer's produce from, a tax, nor to grant benefits to the wage earner working on the produce of small farmers and deny benefits to the wage earner working on the produce of the large farmers.

* * * * * * *

Appellant's (Batt's) processing of products raised on his own farms was an adjunct to

farming necessary to make marketable his produce. He incidentally processed the produce of his neighbors whose farming operations were not large enough to justify the expense of buying equipment and assembling a crew of laborers. All the labor performed either on appellant's (Batt's) farms or on the farms of his neighbors, of much smaller acreage, was agricultural labor and, as such, exempt under the act. There was nothing done to change the character of the farm products by reason of the processing and packing, they continued to remain farm products. What the occupation, business or profession of the employer may be is not controlling, but what type of service is rendered by the employee to the employer."

In re: P. G. Batt, ---------- Idaho ----------, 157 P (2) 547.

Slight or technical differences in operation may in some instances justify, particularly in taxation, the imposing or not imposing of a tax in quite similar but practically, and actually basically different situations. But merely technical, and not actual, or practical differences in situations do not require, and should not justify, imposing a tax in one instance and not in another, especially where the purpose of levying the tax is not for general revenue but to accomplish a social end which will in fact not be accomplished but defeated, by imposition of the tax.

Such is the fact and end result of imposing the

tax here sought by the United States in this and other similar cases.

For the fact is that, as the Idaho Court says above, the type of work of processing farm produce is identical whether done by the farmer's directly employed laborers on his farm, or off his farm, whether done by professional crews, on or off the farm, or by Batt and his crew on or off the farm; so also the equipment and laborers are the same; so also is the produce the same whether that of a large or small farmer; so also the raw product is and remains the same; so also the incidence of the work to farming is the same; so also the necessity of processing for production and marketing and usability the same; so also does ownership in the farmer all through and until after processing is completed remain the same, that is, in the original producer; so also the farmer producer owner disposes of his processed farm produce in the same way. To say that in any one instance the type of work is agricultural labor and in another not agricultural labor is to ignore the actuality, and ignore type of work as a criteria, and is to make the test one of form and not of substance. To say that in any one instance the laborer's wages are taxable, and in another are not taxable, is to tax upon unsubstantial and unreal distinctions, and to impose the burden of tax upon the small producer's produce and not upon the large producer's produce, both competing in the same market. And in this case, as a result of this particular judgment, to impose the tax upon the total wages paid, is to impose a tax

upon 25% of the labor, which was employed in processing farmer Batt's own produce, self processed, which the appellee stipulates not to be taxable.

Furthermore, the purpose of the Social Security Act and the tax itself is defeated by the decision and taxation. The tax was not levied by the United States for the purpose of general or special revenue, but to persuade or induce the States to impose an identical tax for the purpose of raising funds with which the State, not the United States, appellee, could, and must accomplish a desirable and laudable social end, namely, benefits to unemployed laborers, except agricultural labor (and others excepted by the Federal Act). Yet the moneys paid as tax to the United States under this judgment, or otherwise, will not benefit any laborer, whether employed by Batt or otherwise, or whether a laborer working in Idaho or elsewhere, for the statutory fact is that not one cent of the Federal tax is or will be paid out in benefits to a laborer—the Federal act provides no benefits at all to laborers in Idaho or elsewhere, whether nonagricultural or agricultural.

Furthermore the threat of the Federal tax has accomplished the end, and only end, for which it was designed—Idaho has been induced to adopt an Unemployment Act, acceptable to appellee and which excepts agricultural labor from tax in the identical language by which appellee excepts agricultural labor, both without detailed definition. In Idaho where the work is done and the manner of performing it is understood, the common conception of

agricultural labor includes exactly the type of labor here involved performed as herein performed, contracted for as herein contracted for, and not, therefore, taxable under the Idaho law, and by virtue thereof, no benefits are payable out of Idaho funds, to laborers in processing whether employed as herein or otherwise.

Batt v. Unemployment C. Div., 63 Idaho 572, 123 P (2) 1004.

In re: Batt, ... Idaho ....., 157 P (2) 547.

The recovery of the federal tax herein is a purely gratuitous burden upon the produce of small farmers in Idaho, without corresponding or any benefit to the laborers of Idaho.

The seeking of recovery by appellee, and the recovery granted by the trial court, are exaltations of the impractical over the practical, of technicality and formalism over substance and realism.

IV

The trial court lightly dismissed the decisions of the Supreme Court of Idaho involving this identical case (under the Idaho Act) and holding the services to be agricultural and non-taxable.

Batt v. Unemployment C. Div. 63 Idaho 572, 123 P (2) 1004.

In re: Batt, ... Idaho ....., 157 P (2) 547,

by stating the rule that Federal courts are not bound by state interpretations of Federal Acts (Record, p. 28). The Idaho court did not, however, interpret the Federal Act, did not purport to do so, and appellant did not and does not now urge that the Federal Courts are so bound.

What we did, and do, urge is that in view of the unique circumstance here existing where the accomplishment of the great social purpose of the Federal Social Security Act depends for practical and nondiscriminatory administration upon the interpretation of identical statutory words used in both the Federal and the cooperative and necessary State statutes the interpretation of the words by the highest court of the State prior to the interpretation by the Federal court, under identical facts, should be given the highest persuasive weight by the Federal Courts, and the latter in the interests of harmony and practicability, and in the interest of cooperation and of accomplishing the basic purpose of the Federal Act, should not unless otherwise compelled by the strongest reasons adopt a different construction. And this especially where different construction amounts in practice to a penalty upon some, but not all, farm produce, discrimination between small and large producers, and no attendant benefit to laborers.

There is nothing startling in the proposition. Federal Courts adopt, or cite as authority, the interpretations of State Courts and so State Courts do as to Federal Courts. This Court in its North Whittier Heights decision (109 F (2) 76) upon the

National Labor Relations Act cited the decision of a lower state court (Pinnacle Packing Co. v. State Unemployment Commission, unreported); in Stuart v. Kleck, 129 F (2) 400, a decision involving the act in question here, this Court cited state cases from North Dakota, Iowa and Minnesota and the parallel case of Wayland v. Kleck, 112 P (2) 207, an Arizona case in which the controversy arose.

The spirit and practicability and harmony of so doing is illustrated by this Court's observation that

> "* * when the Congress, in providing for an exemption from the provisions of the (Social Security) Act, made use of the broad term 'agricultural labor' this expression, used by itself, must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States."
>
> Stuart v. Kleck, supra, citing a North Dakota State decision and U. S. v. Turner Turpentine Co., 111 F (2) 400, which held
>
> "* * It is now a settled principle of statutory construction that Congress * * * must be regarded as having had in mind the *actual conditions* to which the act will apply, that is, the uses and needs of such activity. When then, Congress in passing an act like the Social Security Act uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor' it must be considered that it used the term in a sense and

> intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind *as that term is understood in the various sections* of the United States where the act operates. * * * It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture has a wide meaning it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced *where* it operates * *"

That decision gave great weight to the understanding in Georgia, where it arose, that labor in turpentine and rosin production was in that state agricultural labor notwithstanding that it involved a change in the raw product harvested from trees by a distilling process after gathering which separated such raw product into two different products, i.e., turpentine and rosin. The Fifth Circuit Court of Appeals adopted the State understanding in its interpretation of "agricultural labor" used in the Federal Social Security Act. In the present case before this Court the raw product from the farm is not changed in any respect by processing, and the Idaho Court has held the services to be agricultural labor.

And it must not be overlooked in this case that in addition to the Idaho decisions classifying the identical services as agricultural labor, the appellee itself has by stipulation classified the identical labor, save as to Batt, as agricultural labor (Rec-

ord, pp. 9, 13, 14-15) and non-taxable. No distinction at all exists as to 25% of the tax attributable to processing Batt's own produce; no substantial or compelling difference has been pointed out or exists with respect to processing other farmer's produce by Batt's crew so as to place that in a different and taxable category.

The cooperative character of the Federal and State Social Security Acts, and the desirability of practical uniformity and harmony in the interpretation of both is stated in Buckstaff Bath House Co. v. McKinley, 308 U. S. 359, 363, 84 L. ed. 322, 325.

> "For that (federal) act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. * * * that Act was an attempt to find a method by which the states and the federal government could work together to a common end. * * * The Act was designed therefore to operate in a dual fashion—state laws to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear * *.
>
> * * * it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. *To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.*"

The Idaho State law expressed also a purpose for harmonious and cooperative operation of the acts:

> "Section 2 * * (b) This law is enacted for the purpose of securing for this state the maximum benefits of the Act of Congress * * and to enable the workmen of Idaho to benefit * * from the provisions of said act, and so far as possible shall be interpreted to conform to the provisions thereof and to the decisions of the courts thereon."
>
> Chap. 12, 1935 3d Extra Sess. Idaho Legislature.

We are aware that the Federal tax may be imposed whether or not a state joins in the cooperative effort, and aware that the federal act term "agricultural labor" is not *required* to be interpreted to cover the same labor as "agricultural labor" in the state, but it was the undoubted *intention* of Congress and of the State legislature that the term cover the same labor; both used the same term in 1938; both have since reiterated the identical term and the definition thereof—

> "(1) Agricultural labor (as defined in subsection (l) of this section; * *
>
> (l) The term "agricultural labor" includes all service performed—* *
>
> (4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any

agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruit and vegetables, as an incident to the preparation of such fruits or vegetables for market. * *"

Act Aug. 10, 1939, c. 666, Title II, Sec. 209, 53 Stat. 1373 (Title 42, Sec. 409, U. S. C.)
Sec. 19 E (f), Chap. 29, pp. 59, 60, Idaho Sess. Laws 1943,

thus again evidencing a common intention under which the tax is not imposed upon the services rendered, as here, by either government.

Is there now in 1945 any compelling reason why this Court should say that for 1938 alone agricultural labor, then recognized and understood in Idaho and again in 1941 by the Courts of Idaho and in 1939 by the Congress, and again in 1943 by the laws of Idaho to include the services in this case, should not include such services and a tax be recovered thereon? Especially in view of the discrimination therefrom arising and hereinbefore pointed out, and of the fact that laborers for whose benefit the laws were enacted cannot and will not be benefited?

V

The trial court rejected this Court's decision in Stuart v. Kleck, 129 F (2) 400 upon the ground that therein was involved work upon a farm. Instead it adopted the "commercial" test of agri-

cultural labor stated in this Court's decisions upon the National Labor Relations Act in No. Whittier Heights Citrus Assn. v. National Labor Relations Board, 109 F (2) 76 and Idaho Potato Growers v. National Labor Relations Board, 144 F (2) 295. The trial court said it was bound by those decisions (Record, pp. 25-28, 31).

Furthermore the trial court in its later opinion said (Record, p. 31)

> "* * one is forced to the conclusion that *from* the time farm produce is delivered to the defendant *and processed*, agricultural labor ceases, and the activities of the defendant from *then* on are of a commercial character and enter the field of industry,"

entirely overlooking, or ignoring, the fact stipulated that *only* wages in respect to *processing* are involved, and that *no* wages with respect to labor or services "from then on", i.e., in purchasing produce, or acting as farmers' selling agent on consignment of the farmer producer, are involved. The stipulation reads

> "The individuals employed, and the total wages *upon which excise tax is claimed*, and contributions mentioned in paragraph 5 of the complaint, and the services of employees *are in respect* to the above and hereinafter described "*processing*" *operations* (Record, p. 7; see also p. 15).

> "The operations which took place at the defendant's sheds and which constituted "processing" as used herein, were primarily a cleaning, sorting, grading and packing operation and in no way changed the raw produce; they were as follows; (then is described in detail the "processing" none of which include purchasing or consigning seller's agent labor) (Record, pp. 12-15)."

Purchasing and consigning were stipulated to occur after "processing" had ended (Record, pp. 8, 10).

The trial court itself found that the tax was only upon processing wages, and that purchasing and consigning labor was after processing and therefore not involved herein (Record, pp. 19, 21, 22, 23, 24-25).

The trial court thus held that processing was agricultural labor, and then inconsistently confused processing with other activities not involved and decreed the whole to be commercial and taxable.

Further the trial court overlooked the applicable principles laid down by this Court in the Kleck case, supra. As applied to this case the significance of the latter case is not in the *place* where the services were rendered, the only thing the trial court considered (Record, pp. 27-28) but in the rejection by this Court of the "commercial" theory in determining agricultural labor under the Social Security Act, and the adoption of the "type of work" theory or test. Kleck stood in exactly the same position as

Batt in respect to his relations with farmers and laborers, and this Court held that relationship did not make agricultural labor non-agricultural;

> "Accordingly (this Court says), the exemption attaches to the 'services performed', which refers to the type of work that is being done, and is not dependant on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor."

Yet, the trial court gave no consideration to "type of work" (Record, p. 29), and based its decision wholly upon *appellant Batt's* activities, after processing, which the court said were commercial (Record, pp. 27, 31).

The trial court further overlooked this Court's holding in the Kleck case that, in harmony with Fosgate Co. v. U. S., 125 F (2) 775, and Cal. Employ. Comm. v. Bowden, 126 P (2) 972, the services were in the employ of the owners or tenants of farms and excepted agricultural labor notwithstanding the

> "crop owners did not directly hire laborers but dealt with the Company, which in turn put laborers to work, and the company was entitled to recover back social security taxes assessed with reference to wages paid those laborers."

The trial court further based its decision and the judgment solely upon National Labor Relations Act

cases (Record, pp. 25-27, 28, 29, 31) again overlooking, or ignoring, the fact that this Court had said in the Kleck case that its decision therein did not conflict with its North Whittier Heights Association case and had said in Idaho Potato Growers v. National Labor Relations Board, 144 F (2) 295, 301

> "It must be borne in mind, however, that the purpose of the statutes governing these federal and state activities (Social Security Act) are very different from the purposes of the so-called Wagner Act (National Labor Relations Act) with which we are here dealing."

There are two and only two factual differences between the case of Stuart v. Kleck and this case, and neither is material. The work of the laborers in the Kleck case was preparing land for cultivation, seeding, constructing dams and reservoirs, operating and repairing farm machinery; the work of the laborers herein was in rendering farm produce marketable and usable. That difference is not material for the latter was as essential, necessary and incidental to agriculture as was cultivation, seeding, irrigating and was stipulated to be non-taxable labor when done for farmers by their own employees or professional crews. The objective of farming is the production and marketing of usable, consumable farm produce, and no matter how much cultivation the produce received on the farm, it still was not marketable or consumable raw produce without processing. It is so stipulated (Record pp.

8-9) and even if not stipulated would be true in fact.

> See Jones v. Gaylord Guernsey Farms, 128 F (2) 1008, 1011 (10th Cir.).
> Stuart v. Kleck, 129 F (2) 400, 402.

The other difference is that labor in the Kleck case was, apparently, largely if not wholly, on the farm; herein it was not. Again it is stipulated that the difference is immaterial, the labor when done by a farmer's employees or by professional crews on or off the farm was non-taxable (Record, p 9). Furthermore the statute did not make the *place* of work a criteria.

VI

The *place* of work is not a criteria. Whether the labor be on or off the farm is immaterial if the type of work is agricultural. The appellee agrees by stipulation that the place of work is not determinative of the type of work, and it agrees that the type of work is agricultural (Record, pp. 8-9).

The Act does not require the labor to be on a farm; it only requires that it be agricultural.

The regulations did not require the work to be on a farm. If they had, and the labor was in fact agricultural, the regulations would have been void, for the Act gave no power to make definitive regulations. It gave power only to make regulations for *enforcement.*

> Section 1108, Title 42, U. S. C.

The Commissioner could not have made agricultural that which was not so in fact; nor made non-agricultural that which was in fact agricultural. He could neither extend nor restrict; he could not say that ploughing was not agricultural labor; he could not say that manufacturing farm machinery was agricultural labor.

> California Employment Comm. v. Bowden, 126 P (2) 972, 976, 979.

Nor did the Commissioner purport to do so. Regulations 90, Art. 206 reads

> "The term 'agricultural labor' *includes* all services performed—(giving categories)."

It does not purport to say that it *excludes* anything else which is agricultural labor in fact. It is not an exclusive and sole definition. In truth the Social Security Act expresses the will of Congress that

> "(a) When used in this chapter—* * *
> (b) The terms 'includes' and 'including' when used in a definition contained in this chapter shall not be deemed to exclude other things otherwise within the meaning of the term defined."
>
> Sec. 1301, Title 42 U. S. C.

And the United States, appellee, stipulates that the type of labor, on or off the farm, is agricultural and non-taxable, as hereinbefore stated; without

such stipulation, the facts are that the type of labor is so essential, so incidental, to the chain of production of marketable produce as to be obviously agricultural.

Furthermore the regulations did not require this type of labor to be performed on the farm. It did require cultivation on a farm and this was referred to in Stuart v. Kleck, but otherwise the place was not material in the partial definition, which read (Reg. 90, Art. 206 (1))

> "Agricultural labor—The term 'agricultural labor' includes all services performed—* * *
>
> (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation or marketing of those materials or articles. Such services do not constitute 'agricultural labor', however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations."

The services herein were upon materials produced on farms, either Batt's or those of others; they were performed by employees of the owners or tenants of the farms upon which the materials were

produced (Stuart v. Kleck, supra; Fosgate Co. v. U. S., supra) in their raw or natural state, and the services were carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations and so stipulated.

The judgment should be reversed not only with respect to 25% of the tax attributable to Batt's farm produce and services thereon, but also with respect to the whole tax.

Respectfully submitted,

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